APPENDIX A

OPINION RENDERED:
May 22, 1987 3:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
86-CA-1288-MR

TERRENCE K. BRADY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GEORGE E. BARKER, JUDGE
ACTION NO. 75-CI-32

H. FOSTER PETTIT, Mayor, Lexington-Fayette Urban County Government; DEAN D. HUNTER, JR., Chief Administrative Officer of the Lexington-Fayette Urban County Government; SIDNEY C. KINKEAD, JR., Chairman; JULIAN A. JACKSON, SR., WILFRED T. SEALS, WALTER LEET, JR., and WANDA V. CRANFILL, Members, Lexington-Fayette Urban County Government Civil Service Commission — APPELLEES

AFFIRMING

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BEFORE: Howerton, Chief Judge; CLAYTON and WILHOIT, Judges.

HOWERTON, CHIEF JUDGE. Brady appeals from an opinion and order prepared by Judge George E. Barker

of the Fayette Circuit Court affirming Brady's dismissal by the Lexington-Fayette Urban County Civil Service Commission. The judicial history of this case covers 12 years and a previous trip to the Kentucky Supreme Court culminating in the decision of *Brady* v. *Pettit,* Ky., 586 S.W.2d 29. The decision set out the requirements of a reviewing court for civil service commission decisions and remanded the case to the circuit court for further proceedings. We have reviewed the record and considered the issues presented by Brady, and we are of the opinion that the decision by Judge Barker thoroughly and correctly considered all of the points which are now allegations of error. We also determine that Judge Barker correctly followed and complied with the mandate of the Supreme Court decision. We therefore adopt the opinion of Judge Barker rendered April 1, 1986, as the opinion of this Court.

The decision of the Fayette Circuit Court affirming the dismissal of Brady by the Lexington-Fayette Urban County Government is affirmed.

ALL CONCUR.

ATTORNEY FOR APPELLANT:

William C. Jacobs
173 North Limestone Street
Lexington, KY 40507

ATTORNEYS FOR APPELLEES:

Edward W. Gardner
Theresa L. Holmes
Department of Law
Lexington-Fayette Urban County Government
200 East Main Street
Lexington, KY 40507

* * * * * * *

FAYETTE CIRCUIT COURT
CIVIL BRANCH
SIXTH DIVISION

APPENDIX B

APR 01 1986

TERRENCE K. BRADY APPELLANT

VS. NO. 75-32

OPINION AND ORDER

H. FOSTER PETTIT, Mayor, et al APPELLEES

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This case is submitted to the Court for decision upon the issues raised, first by Appellant's Motion for a Leave to Amend his Complaint, which Motion was sustained by the Court over Appellees objection with the understanding that the propriety of permitting amendment would be reconsidered upon Appellees subsequent Motion to Dismiss, which now has been filed. The issues have been briefed by counsel for the parties and the Court has reviewed the entire record.

This case had its genesis on September 19, 1974 when the Appellant Brady, then Director of Personnel for the newly created Lexington-Fayette Urban County Government chose to invite a newspaper reporter into his office for the purpose of giving her a series of statements critical of H. Foster Pettit, Mayor, Harry Sykes, Acting Chief Administrative Officer, unnamed supervisors of various departments in the Urban County Government, the Urban County Council and others, which statements were published in the local newspaper. Additional statements were made by Appellant in the same manner the following day.

On October 17, 1974, the Appellee Pettit (hereinafter referred to as Mayor) preferred charges against the Appellant Brady (hereinafter referred to as Brady) accusing him of misconduct for his actions in making these statements. As provided by statute these charges were heard by the Lexington-Fayette Urban County Civil Service Commission (hereinafter referred to as Commission) and on December 10, 1974, the Commission issued its Opinion, Findings and Decision finding Brady guilty of misconduct and fixing his punishment at discharge.

This lawsuit was filed January 8, 1975 and is an appeal from the decision of the Commission pursuant to KRS 67A.290, which in pertinent part reads as follows:

> (2) Upon request in writing by the accused and the payment of cost therefor, the secretary of the Civil Service Commission shall file a certified copy of the charges and the judgment of that body in the Circuit Court. Upon the transcript being filed, the case shall be docketed in the Circuit Court and tried de novo.

Brady did not file a transcript of the evidence heard by the Commission with his appeal and the Appellees moved the Court to dismiss the action for that reason. The Court overruled that Motion but subsequently provided that in the absence of a transcript of evidence the Court would review the case based on the record

and the legal briefs of counsel in order to determine legal questions but would not permit the recalling of the witnesses already heard by the Commission and a full rehearing of the evidence heard by the Commission, that is, a trial de novo.

The Court overruled Brady's Motion for Summary Judgment on September 3, 1975 and subsequently legal briefs were filed by counsel addressing the constitutional issues.

On February 7, 1977, this Court decided the case adversely to Brady by a written opinion and an appeal was taken by Brady from the order dismissing the appeal. The Court of Appeals affirmed the trial court but the Supreme Court of Kentucky took discretionary review and reversed and remanded the case on procedural grounds, specifically not addressing the constitutional issue.

The mandate of the Supreme Court was issued July 24, 1979 and on October 17, 1979, Brady moved the Court for a pre-trial conference in order that the parties and the Court might review the decision of the Supreme Court and determine the appropriate procedure to be followed in the trial of the matter. The following portions of the opinion of the Supreme Court were primarily the subject of discussion at the pre-trial conference:

> "In summary, it appears that in public employee discharge cases where there is a trial de novo

statute, the discharged employee is entitled to something less than a classic trial de novo in Circuit Court. In this proceeding in Circuit Court the burden of proof shifts to the discharged employee. After review of the transcript of evidence or hearing the witnesses, the trial court is limited in its decision. The trial court may not substitute its judgment for that of the administrative body, that is, there may not be a substitute punishment. The trial court may find the discharged employee has failed to meet the burden of proof and affirm the action of the administrative board; or if it is found that the employee has sustained the burden of proof, the trial court may set aside the punishment. We are of the opinion that trial de novo be further refined to the extent that the discharged employee has the obligation of producing the transcript of evidence of the proceeding before the administrative board. We are of the further opinion that review of the transcript of evidence in Circuit Court is a corollary to the burden of proof which has shifted to the discharged employee. In Circuit Court, the transcript of evidence is reviewed but the proceeding is not limited to this review; the discharged employee is accorded the right to call such additional witnesses as he may desire. The trial court's review is limited to a determination of whether the administrative body acted *arbitrarily.*"

The provision in the Opinion as to the calling of "additional" witnesses at the trial required the Court to have some method for determining in advance of

trial just what additional witnesses would be called and in order to provide some type of discovery for the Appellees as well as to enable the Court to rule upon such objections as might be made to the testimony of such witnesses by Appellees. Clearly, in a civil case Appellees could not be forced to a trial and be expected to defend against witnesses they didn't know about and testimony they had never heard about. Therefore, a pre-trial order was entered November 21, 1979 which provided that Brady would notify the Court and opposing counsel of the names and addresses of proposed additional witnesses together with the substance of their expected testimony.

No further action was taken in this case by Brady until January 6, 1983 when an agreed order was entered permitting Brady's then counsel to withdraw and substituting present counsel. The transcript of the evidence heard by the Commission was not filed until February 23, 1983, although the Court Reporter's Certificates would indicate that the evidence was transcribed during the months of August and September, 1979.

On February 25, 1983, the Court heard and overruled a Motion by Brady to amend the pre-trial order of November 21, 1979 so as to relieve him of the burden of submitting to the Court in advance of trial the names and addresses of proposed additional witnesses and the substance of expected testimony.

The next activity in this case occurred on May 10, 1984 when Brady filed a Motion for Summary Judgment which in effect requested a reconsideration of the 1977 decision by the Court on the constitutional issue. Legal briefs were filed by counsel for the parties but no order of submission was entered and no order has been entered disposing of this motion.

The next activity in this case came on February 18, 1986 when Brady filed his Motion for Permission to Amend his Complaint. An amended complaint was filed February 24, 1986 and Defendants' Motion to Dismiss was filed March 3, 1986 and an Order of Submission was entered March 17, 1986.

First, the Court will discuss the matter of the amended complaint. This case started out over 11 years ago as an appeal from a decision of a Civil Service Commission pursuant to a State statute, KRS 67A.290. This appeal has been decided by this Court, appealed by Brady and reversed and remanded back to this Court where it has rested relatively dormant for over six and one-half years. Now, by his amended complaint, Brady would propose to start all over again pursuant to a Federal statute, 42 U.S.C. Section 1983. While it may be true that the cause of action stated in the amended complaint is grounded on the same events which precipitated the within appeal, it is also true that these events occurred back in 1974 over 11 years ago. Some of the parties to this action are now deceased and the others are no longer associated with the Urban County

Government. Some of the witnesses are now deceased and others have relocated out of state. It would appear that the passage of time alone would be sufficient cause to deny the filing of an amended complaint.

However, in addition to that cause, Brady now attempts to proceed upon an entirely different cause of action, statutory in nature. The proceedings would be entirely different and the relief obtainable different to a substantial degree. The nature of the evidence required to rebut the allegations of Brady under the amended complaint would be substantially different so that the testimony of witnesses recorded in 1974 would not necessarily refresh their recollections as to issues critical to a Section 1983 action.

It is significant to note that clearly an independent action by Brady under Section 1983 would be barred by the statute of limitations. In fact, according to statements of counsel, Brady did file an independent action in Federal Court pursuant to Section 1983 which action was dismissed by the District Court as barred by limitations and this dismissal was affirmed by the Sixth Circuit Court of Appeals. Certiorari was denied by the United States Supreme Court.

It is the opinion of this Court that a cause of action so clearly barred by limitations cannot be born again by piggyback using the device of an amended complaint and the relation back provisions of CR 15.03. Therefore, the motion to dismiss the amended complaint should be

sustained and the order allowing the amended complaint to be filed should be set aside as improvidently granted.

Now, this Court, having reviewed the entire record, is of the opinion that the time has come, if not long past, when this case should be finally put to rest. The transcript of evidence heard by the Civil Service Commission is before the Court and the legal issues have been fully briefed and re-briefed by counsel for the parties. Six and one-half years would appear to be ample time for Brady to have presented any "additional" witnesses as authorized by the Supreme Court. Brady claims that this Court's order entered in 1979 has hampered if not precluded him from presenting additional witnesses, but this Court cannot believe that the Supreme Court, by its opinion, intended to create a trial procedure whereby the appellant in an appeal from a decision by an administrative board would have the right of trial by ambush. In every other trial proceeding known to this Court, the adverse party is entitled at least to know the names of opposing witnesses and to have the opportunity to discover their testimony so as to prepare for trial and to present rebuttal witnesses. Since 1979, Brady has not asked for a trial nor has he given any indication that he has additional witnesses to present. This Court must conclude that Brady has waived his right to present additional witnesses and therefore this case is as ready as it will ever be for final decision.

According to the opinion of the Supreme Court of Kentucky (*Brady* v. *Pettit*, Ky. 586 S.W.2d 29 (1979)) the trial court's review is limited to a determination of whether the administrative body acted *arbitrarily*. Included in this duty would be (1) a determination of whether there was substantial evidence of probative value to support the findings and decision of the administrative body and (2) a determination of whether the decisions of the administrative body violated any of the statutory or constitutional rights of the discharged employee.

This Court has read and considered carefully the nine volumes of the transcript of evidence filed in this case which contain the testimony of some 28 witnesses and some 61 documentary exhibits. Clearly there was substantial evidence of probative value to support the findings and decision of the Commission.

The second task of the Court is more difficult because it requires a close analysis of the evidence and the application of the facts established to the law of the case. This Court would first observe that Brady was afforded procedural due process in that the provisions of the applicable statute were followed, he was afforded a full and fairly conducted trial-type hearing, he was represented by extremely able counsel and he was given every opportunity to present evidence in his own behalf.

The next question is whether the public statements made by Brady and which form the basis of the charges

against him were entitled to constitutional protection. This Court has carefully reconsidered the legal briefs of counsel submitted back in 1977 and has carefully considered the additional legal briefs of counsel submitted in connection with Brady's more recent motion for summary judgment. It is the opinion of this Court that the law of this case and the guidelines for the Court's review of the facts are set out in the cases of *Pickering* v. *Board of Education,* 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968) and *Connick* v. *Myers,* _____ U.S. _____, 75 L.Ed.2d 708, 103 S.Ct. _____, (1983).

The basic constitutional principal to be kept in mind while reviewing this case is stated in *Pickering,* supra, as follows:

> The theory that public employment which may be denied all together may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.
>
> At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

It is the opinion of this Court that neither *Pickering,* supra, nor *Connick,* supra, stands for either of the propositions that (1) "the public statements of an employee to justify discharge must be made with knowledge that they were false or with reckless disregard of whether they were false or not"; or (2) that a government employee has an unqualified right to comment upon matters of public concern no matter what the consequences. In *Pickering,* the Court stated:

> "Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."

Nevertheless, the Court in *Pickering* did offer some guidance to assist in an analysis of the controlling interest of employee and employer. It would appear that this Court in its application of the balancing test should consider (1) whether the statements were directed towards any person with whom the employee would normally be in contact in the course of his daily work, (2) whether the relationship between the employee and the person or persons against whom the statements were made was such that it could persuasively be claimed that personal loyalty and confidence were necessary for a proper functioning of

the relationship and (3) whether the fact of the employment was substantially involved in the subject matter of the public statements so that the conclusion could be reached that the statements were made as an employee of the government rather than as a member of the general public.

In *Connick,* the Supreme Court found that part of the discharged employees speech did involve a matter of public concern but held that the *Pickering* balancing test still applied. The Court provided further guidance and clarification of the issues to be considered in applying the balancing test, stating:

> Yet *Pickering* unmistakeably states and respondent agrees, that the states burden in justifying a particular discharge varies depending upon the nature of the employees expression. Although such particularized balancing is difficult, the Courts must reach the most appropriate possible balance of the competing interest.

The Court in *Connick* went on to say that when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employers judgment is appropriate and that on the other hand, a stronger showing might be necessary if the employees speech more substantially involved matters of public concern. The Court also pointed out that relevant to the *Pickering* balance is the manner, time and p.ace the speech is made, stating:

> "When a government employee personally confronts his immediate superior, the employing agencies institutional efficiency may be threatened not only by the content of the employees message but also by the manner, time and place in which it is delivered."

The public statements made by Brady and which formed the basis of the charges against him involve matters of public concern and are as follows:

Brady stated that the Mayor had attempted to use the personnel office for "political appointment" by trying to bend the Civil Service Rules. He stated that the Mayor had "used" Harry Sykes, the Acting Chief Administrative Officer, (who was Brady's immediate superior) and that Sykes' position in the government had been one of "tokenism". He stated that the Mayor had asked about "bending certain Civil Service procedures" for the appointment of a Director of Planning and that he had delayed the appointment and now wants to reopen the search for someone to fill the position and that it was "possible" the Mayor was trying to get a particular person for this job.

Brady further stated that for some time he had been trying to get extra help for his office and that he had gone to the Mayor, the Administration and the Council but had gotten no support. He stated "I think in essence this is being done purposely as a way to hamstring this office".

Brady charged that promotions in both the police and fire departments were handled internally and that in the fire department there were "accusations of favoritism". He also stated that supervisors throughout the government were failing to post on the bulletin board notices stating which jobs are coming open and that some supervisors are "deliberately holding back" this information. He further stated that the Mayor's administrative assistant, Ms. Diane Schorr "has been acting defacto as CAO".

It will be noted that almost everyone in the management echelon of government felt the fire of Brady's comments. He criticized and accused the Mayor, Urban County Council Acting Chief Administrative Officer, Police and Fire Departments, and all department supervisors. Brady's position as Director of Personnel was one which required close working relationships with all the people he criticized. It would be difficult to imagine how Brady could have continued to perform his job after this outburst. A number of witnesses testified to the effect that Brady had destroyed his ability to perform the function of Director of Personnel.

It is clear that Brady's position as Director of Personnel was one in which the Mayor, CAO, Department heads and supervisors and the Council needed to have respect for and confidence in to insure the effective functioning of government. Considering the nature of allegations and the time, manner and

place of making them it is clear from the evidence that Brady no longer held the confidence and respect of management people in those departments of government which his office served on a daily basis. Several members of the Urban County Council also testified that they had lost confidence in him.

It is clear from the statements made and from the evidence that Brady spoke not as a member of the public but rather from his podium as Director of Personnel. He claimed to be overworked and that he couldn't get necessary help and, in effect, that the Mayor and the Urban County Council were causing this problem deliberately to "hamstring" his office. Similar charges by an employee in the lower echelons of government would not have created the disturbance and public consternation caused by Brady's statements as Director of Personnel nor would they have received the publicity. Brady's statements were front page news and the headline read "Personnel Chief levels charges at Pettit".

It should be noted that Brady's statements were not so much statements of fact which could be proven or disproven, but were statements of his opinions and conclusions. The evidence reveals that the various incidents which occurred that formed the basis of Brady's conclusions were matters which would not have prompted a reasonable person to draw the same conclusions. Those things claimed to have been done or not done by the Mayor, his administrative assistant,

the acting CAO, Department supervisors, the Council and others are shown by the evidence either not to have occurred or to have been done with proper motivation rather than with the evil intent suggested by Brady. The seriousness of the incidents alleged in no way was comparable to the seriousness of the conclusions and opinions expressed by Brady. This Court must find from the evidence as a whole that Brady's statements were substantially false.

It appears from the evidence that although the various incidents cited by Brady occurred over a period of months, some even before the Urban County Government came into existence, he had made no real complaint or objection nor made any effort to correct that which he perceived to be improper. Neither did he discuss these matters with any person, other than his wife, nor did he give to those people in government with whom he was friendly and closely associated any indication that he was harboring such hostile and unfriendly feelings. His statements appeared to catch everyone by complete surprise and Brady admitted that he knew that his statements would surprise and hurt the Mayor. It appears from the evidence that Brady acted much like Chicken Little of nursery story fame who saw an acorn fall and shouted "the sky is falling"! Chicken Little, like Brady, jumped to that conclusion all by himself and without regard to the consternation such proclamation would bring to others. The Court must find from the evidence that while Brady may not

have actually known that the conclusions and opinions expressed by him were false, his public statements were made recklessly without regard to whether they were false or not because he did not make any real investigation nor seek any explanation, relying only on the inferences that were formed in his own mind.

It is not the opinion of this Court that the public statements of an employee of government must be either reasonable or constructive in order to be protected by the First amendment. Neither does this Court say that an employee of government can first be required to exhaust specified grievance procedures before being allowed to speak publicly. What this Court does say is that the duties and responsibilities of a particular office in government employment may well be such that public speech is not appropriate until after a reasonable and rational investigation is made and that the responsibilities of such office may well require that the one who occupies such office has the duty to consider the consequences of public speech before exercising the right. It is the opinion of this Court that the Director of Personnel in the Urban County Government at the time in question had such duties and responsibilities and that in the reasonable exercise of them he should not have spoken at the time and in the manner in which he did speak.

It is the opinion of this Court that in the application of the balancing test of *Pickering* the balance must be struck for the government. This decision does not serve

to weaken nor restrict the protections afforded by the First amendment. It simply means that in this particular case, the public interest in promoting the efficient functioning of its government outweighs the public interest in promoting free and unfettered public speech.

It is the opinion of this Court that the decision of the Commission finding Brady guilty of misconduct and fixing his punishment at discharge should be affirmed and that Brady's appeal should be dismissed at his cost.

Wherefore it is hereby,

ORDERED as follows:

(1) Appellees Motion to Dismiss the Amended Complaint is hereby sustained and the Amended Complaint is hereby dismissed at Appellant's cost.

(2) The Order permitting the filing of Appellant's Amended Complaint is hereby set aside and held for naught.

(3) The decision of the Lexington-Fayette Urban County Civil Service Commission is hereby affirmed and this appeal is hereby dismissed at Appellant's cost.

(4) This is a final and appealable judgment.

/s/ George E. Barker
GEORGE E. BARKER, JUDGE
FAYETTE CIRCUIT COURT

This is to certify that an attested copy of the within Opinion and Order was served by mailing an attested copy to Hon. William C. Jacobs, 173 North Limestone Street, Lexington, Kentucky 40507, Attorney for Appellant and Hon. Edward W. Gardner, Director of Litigation and Hon. Theresa L. Holmes, Corporate Council, Lexington-Fayette Urban County Government, Department of Law, 200 East Main Street, Lexington, Kentucky 40507, Attorney for Appellees, this the 1 day of April, 1986.

/s/ Pam Clifton
DEPUTY CIRCUIT COURT
CLERK

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APPENDIX C

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT CIVIL SERVICE COMMISSION
(December 10,1974)

IN RE: TERRENCE K. BRADY,
DIRECTOR OF PERSONNEL

OPINION, FINDINGS AND DECISION

* * * * *

Following the hearing before this Commission on the charges filed by Terrence K. Brady with this Commission, which charges have been made a part of the record of the proceedings herein, presentation of testimony, other evidence and legal arguments by the respective parties, this Commission retired to consider the law and evidence on the questions before it, and being sufficiently advised, renders the following opinion, findings and decision:

1. All motions made by respective parties during the trial and taken under advisement by the Commission be, and are, hereby overruled, but the extent to which questions of law and fact raised therein are applicable to the merits of this case, this Commission has taken them into consideration in its deliberations in rendering its decision herein.

2. The only questions before this Commission are whether or not Terrence K. Brady in fact committed the acts or omissions specifically set forth

in the charges; whether if in fact Terrence K. Brady did commit all or any of said acts or omissions, such acts or omissions constitute such misconduct as contemplated by the applicable sections of KRS Chapter 90, and in light of other applicable laws of the Commonwealth of Kentucky and the United States of America; and, if guilty of such misconduct, what shall the punishment be.

It is generally undisputed and we so find that Terrence K. Brady on September 19, 1974, while holding the responsible position of Director of Personnel of the Government, arranged and gave a press interview with a reporter of the Lexington Leader, a newspaper of general circulation in the Urban County, in which he made serious charges concerning H. Foster Pettit, Mayor, Urban County Government Supervisors and the Urban County Council as specifically described in the charges herein; and, further that on September 20, 1974, said Terrence K. Brady did in an interview with a reporter of the Lexington Leader, a newspaper of general circulation in the Urban County, make additional charges concerning H. Foster Pettit, Mayor, Diane Schorr, the Mayor's Administrative Assistant and fellow department heads resulting in newspaper articles attached to the charges herein and referred to therein as Exhibit B; and further on September 24, 1974, said Terrence K. Brady conferred in the Urban County Council Chambers

with various representatives of the Fayette County news media and did reaffirm his previous allegations, charges and statements to the news media against the aforesaid Mayor Pettit and others; and further said Terrence K. Brady committed the foregoing acts deliberately and intentionally without first or simultaneously therewith making said statements, charges or the substance thereof or his concern therewith known to any of the persons or bodies of government involved therein, including his immediate supervisor, the CAO, the chief executive of the Urban County Government, the Mayor, the Urban County Council or any of its appropriate committees or members, the Commissioner of law for the Urban County Government, the Civil Service Commission and the Civil Service Association, by direct communication or memoranda.

It is further significant that by Mr. Brady's own testimony he did not consult with anyone prior to his statements to the press on September 19, 1974; except his wife; that he did not expect any constructive action as a result of the statement to the newspapers, but merely, "wanted the voters to know what was going on".

It is of particular concern to this Commission that Mr. Brady did not see fit to first consult with his immediate superior, the Chief Administrative Officer of the Urban County Government, as well as the Civil Service Commission in view of the close

working relationship existing with that Commission and in specific Section 7.03 of Article VII of the Charter of the Lexington-Fayette Urban County Government, which charges said Commission to ". . . advise and assist the Director of Personnel in the office of administrative services and the Chief Administrative Officer on all matters pertaining to the operation and administration of the classified Civil Service System of the merged government . . .".

Mr. Brady's position as Director of Personnel is a sensitive and important position in the administration of the business of the Lexington-Fayette Urban County Government. The Charter of the Lexington-Fayette Urban County Government and in particular Section 9.05, Article IX, charges the Division of Personnel and therefore Terrence K. Brady as Director thereof with responsibility ". . . for the administration of all ordinances and regulations pertaining to the classified Civil Service including all recruitment, examination, classification, probation, promotion and compensation programs affecting the classified Civil Service" and under Section 9.06 with the duty to " . . . administer all ordinance and regulations pertaining to the employment and compensation of persons exempted from the classified Civil Service under the terms of this Charter".

We believe that if the Director of Personnel of Lexington-Fayette Urban County Government believed that there existed improprieties and rule

bending in the area of personnel that it was encumbent upon him to take affirmative steps within the structure of the government to correct these situations or bring them to the attention of his superiors, and if warranted, in his opinion, to the Civil Service Commission and the Urban County Council. He did not do so prior to or simultaneously with his announcement to the press nor has it been shown that he did so subsequently and prior to his suspension some thirty days later.

It is the opinion of this Commission that a reasonable man under the same and similar circumstances would not so have conducted himself and that the handling of the entire matter by Terrence K. Brady as shown by the evidence herein is conduct that has unnecessarily and improperly undermined public faith in the personnel system of government, caused a breach or disruption of communications between the Director of Personnel and other persons in the Executive Branch of government. We are further of the opinion that although without malice but with a reckless disregard for the consequences said conduct was calculated to disrupt the orderly and harmonious operation of the government and its personnel system. Such conduct constitutes misconduct within the meaning of KRS Chapter 90.

It is not solely the making of the statements to the press as charged, nor the statements themselves, with which we find fault, but the manner in which they were made in view of the serious nature of the

allegations therein without first having taken constructive steps to correct the alleged irregularities by bringing them to the attention of one or more of the persons or bodies referred to above. We do not see such preliminary steps as we suggest to in any way infringe upon, hinder or impede Mr. Brady's "option" to make the substance of these matters known to the voters at a subsequent and more appropriate time.

Having concluded that Terrence K. Brady is guilty of misconduct within the meaning of KRS Chapter 90, we are faced with the far more difficult task of fixing his punishment. In view of the obvious recent concern of legislative bodies and the courts with the public's right to know what is going on in our government as exemplified in such things as the various "open meeting", ordinances, laws and related judicial rulings, we have great concern that our decision in this case might have the undesirable effect in some way of counter-balancing this desirable policy and trend toward the public's "right to know". We likewise are cognizant of the desirable results often achieved by independent public disclosure as exemplified in the "Watergate" proceedings.

We are cognizant of the legal axiom that the "punishment should fit the crime". We are likewise cognizant of the fact that circumstances and the state of mind of an individual charged, at least in the areas of criminal law, regularly constitute circumstances mitigating the harshness of the degree of punishment otherwise called for.

We are convinced that there was no evil or malice in a legal sense on the part of Mr. Brady in taking the action he did. We do find some fault on the part of the Mayor, which could have tended to have encouraged Mr. Brady's distrust of the Mayor and the system of administration of the government of which Mr. Brady was an important part.

We do not think the Mayor should have gone to the Personnel Director on behalf of John Bagby.

We do not think the Mayor should have gone outside the Civil Service Commission to seek advice on the qualifications of applicants for the position of Director of Planning after a list of three applicants had been certified as qualified and submitted to him for selection and/or delayed his selection process which had the result of defeating the availability of those applicants so certified by this Commission. These actions, even though properly motivated, have the effect of undermining the intent of our civil service law.

The evidence presented at the hearing is far from conclusive of any illegality on the part of the Mayor. We do believe some impropriety at least existed with regard to the two instances referred to above such as to constitute some explanation for the allegations on behalf of Mr. Brady of attempts to bend Civil Service rules.

We have not attempted for purposes of this decision to find the truth or falsity of each of the allegations

and statements of Mr. Brady, which precipitated this hearing, and while we do not find that Mr. Brady's charges are totally without merit and we emphasize the word "totally", we do find from the evidence some inference or inferences which could lend merit to some of the accusations or statements by Mr. Brady.

Accepting the existence of such inferences and Mr. Brady's profession of having acted in what he believed was the best interests of the public, which we accept but disagree with, the Commission recognizes the persuasiveness of this toward mitigating the harshness of the punishment recommended by the government. This Commission has pursued this possibility seriously and extensively, but in view of the disruption of government precipitated by Mr. Brady's actions and the lack of faith in his ability to continue to effectively and efficiently function as Director of Personnel for the Urban County Government engendered by Mr. Brady in his superiors and contemporaries, convinces us that we have no alternative in fact but to fix his punishment at discharge.

We find Terrence K. Brady guilty of misconduct under the charges herein and fix his punishment at discharge, effective December 31, 1974.

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, CIVIL
SERVICE COMMISSION

BY.: /s/ Sidney C. Kinkead, Jr.
CHAIRMAN

All Members Concurring
/s/ Wilfred T. Seals
/s/ Julian A. Jackson, Jr.
/s/ Walter Leet, Jr.
/s/ Wanda V. Cranfill

* * * * * * *

APPENDIX D

FEB 7 1977

FAYETTE CIRCUIT COURT
SIXTH DIVISION

TERRENCE K. BRADY		APPELLANT PLAINTIFF
VS.	OPINION	NO. 75-32
H. FOSTER PETTIT, MAYOR, ET AL		APPELLEES DEFENDANTS

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The Court has considered the briefs filed by the parties pursuant to previous order of the Court and although no order of submission has been filed as required by previous order of the Court and RFCC 19, the Court will undertake to examine the issues raised by the briefs of the parties and to make a final decision herein.

However, before discussing the ultimate issues, it is deemed appropriate that the Court clarify and explain its previous order which overruled Appellant Brady's demand for trial de novo and trial by jury. This order was based upon an opinion by the Court in which the Court addressed the question of how this case should be tried. As noted in the Court's opinion, this case was an appeal from a decision of the Civil Service Commission prosecuted under the provisions of KRS 67A.290 which provides, "upon the transcript being filed the case shall be docketed in the Circuit Court

and tried de novo." As to the statutory provision that the case should be tried de novo, this Court expressed the opinion that such requirement of the statute would impose upon the Court a non-judicial function in controvention of Section 27 of the Kentucky Constitution. In support of this reasoning by the Court the case of *American Beauty Homes Corporation* v. *Louisville, etc.,* Ky. 379 SW 2d 450 was cited. Subsequently, however, Appellant Brady moved the Court to reconsider and grant a trial de novo upon the authority of *Osborne* v. *Bullitt County Board of Education,* Ky. 415 SW 2d 607 (1967), *Story* v. *Simpson County Board of Education,* Ky. 420 SW 2d 578 (1967) and *Whispering Hills Country Club* v. *Kentucky Commission on Human Rights,* Ky. 475 SW 2d 645 (1972).

Appellant's motion to reconsider was overruled without explanation of the Court at the time, but it would now seem appropriate that an explanation of this decision be given. In the first place, in the light of the *Osborne* and *Story* cases we believe that this Court was in error to the extent that it implied that the provision of KRS 67A.290 providing for trial de novo was unconstitutional and of no effect. It is our present opinion that this provision of the statute does have the effect of conferring upon the Circuit Court the jurisdiction to hear appeals pursuant to this statute "de novo" if the circumstances of the case so require. However it is still our opinion that the statute should

not be construed to mandatorily require a Circuit Court to hear all evidence which could be presented in a case, including all the evidence heard by the Civil Service Commission, when the facts to be found from such evidence would only bear upon the exercise of a purely executive or administrative discretion. In other words, it is the opinion of this Court that where a statute simply provides for "trial de novo", such language should be considered permissive and not mandatory to the extent that the Circuit Court should decide, based upon the facts and circumstances of the particular case, what must be done to satisfy its judicial function without trespassing into the field of either legislative or executive function.

Indeed, such decision may require a trial de novo as found by the Court of Appeals in the *Osborne* and *Story* cases, both of which cases involved appeals from decisions of Boards of Education interpreting a teacher's contract of employment and where the facts and the statute authorizing appeal were much different from those in the case presently before this Court.

The Court in the *Osborne* case stated as follows;

> "We agree with the foregoing authorities that the Legislature may properly require a trial de novo upon bodies without doing violence to the constitutional requirement of separation of powers. We believe the principle of due process requires that certain actions of administrative bodies be fully and completely reviewed in de novo

> proceedings especially where due process has not been observed in the administrative proceeding."

We interpret the foregoing language to mean that while the Legislature may properly require a de novo trial from certain actions of administrative bodies, de novo trial may not be required in certain other actions of administrative bodies. It would appear that the ultimate decisions as to which was which would have to be made by the courts. For example, in the case of *City of Richmond* v. *Howell,* Ky. 448 SW 2d 662 (1969) decided after the *Osborne* and *Story* cases, the Court of Appeals held that even though the statute KRS 95.460 provided for a trial de novo upon the appeal from the decision of the legislative body of the City of Richmond discharging the police officer, that something less than a de novo trial was authorized. In that case the Court of Appeals held that the Circuit Court had the authority to rehear the evidence as to the charges brought against the police officer, but having found from that evidence that the officer was guilty of some of the charges, the Circuit Court was not authorized to change the punishment. The Court stated:

> "In the conduct and management of a police department, the City, like any other business, by necessity must have rules and regulations and must have a means of enforcing them. The City officials are in better position to perform this

> function than are the Courts. Certainly the Courts would not relish the notion of acting as disciplinarian of the numerous police officers throughout the Commonwealth. Sound public policy requires that the matter of punishment and discipline of the police officer be left to his employer—the legislative body in the present instance."

Therefore it is still our opinion that despite appellant's demand for trial de novo and trial by jury, this Court should try only those issues raised by the pleadings which lie within the scope of judicial function.

KRS 67A.280 sets out the only procedure whereby an employee in the classified service of the Urban County Government may be dismissed. This statute provides for the filing of charges, notice to the employee and a trial type hearing of the charges by the Civil Service Commission. This Court finds that the appellant's right to due process is fully protected by the statute and that the proceedings before the Civil Service Commission were conducted in accordance with the statute.

The charges filed against appellant by the Mayor, in substance were that appellant had engaged in misconduct by making certain statements and accusations against the Mayor, the Acting Chief Administrative Officer, and fellow supervisors to a newspaper reporter thereby making them public via the news media rather than through proper channels

provided within the structure of government. Appellant does not deny having made the statements and accusations to the newspaper as alleged but rather relies upon his right to have made those statements to the news media without having gone through channels, providing the statements were not known to be false by him or made with reckless disregard of their truth or falsity. The Civil Service Commission did not find that any of the statements made by appellant were false and in fact found that at least some of them were true. The Commission further found that the appellant had not acted maliciously. According to the opinion, findings and decision of the Civil Service Commission, the truth or falsity of the statements and accusations made by appellant was not an issue.

Since it is admitted that appellant did make the statements and accusations attributed to him and since the truth or falsity of those statements was not made an issue at the Civil Service Commission hearing, then it would follow that the only factual determination to be made is whether or not appellant's conduct had such deleterious effect upon the proper operation of the government and appellant's ability to perform his duties as an employee of the government as to constitute misconduct and to justify his dismissal.

It is the opinion of this Court that such determinations call for the exercise of administrative or executive discretion. In cases of this kind the legislature has provided for an independent

commission composed of five citizens charged with the responsibility of exercising such discretion. It would be illogical and unwise for a single Circuit Judge to be permitted to substitute his judgment for the judgment of the legally authorized and appointed Commission on matters having to do solely with the internal administration of employer-employee relationships within the Urban County Government. The judicial function in such cases should be limited to an overview to determine if the employee's substantial rights were protected and if the action of the Commission was patently arbitrary or frivolous.

Therefore, in this case, the Court will not rehear the evidence presented to the Civil Service Commission but will look to the legal issues raised by the pleadings. In practical effect, the Court will exercise summary judgment procedure.

By his pleadings appellant alleges that the charges against him were not filed in accordance with KRS 67A.280 (2). This issue was heard earlier upon appellant's motion for summary judgment and was decided adversely to appellant.

Appellant further alleges that the proceedings before the Civil Service Commission should be declared void because the Chairman of the Commission refused to recuse himself upon request of appellant. It is alleged that the Chairman should be disqualified because one of his law partners, George Mills, was a witness at the hearing before the Commission and that there was a

conflict between the testimony of Mills and the testimony of the appellant. However, according to appellant's pleadings Mills merely testified that he did not recall doing what appellant said he did which does not produce a direct conflict. In any event, the testimony of Mills had only to do with the truth or falsity of the statements made by appellant. Since the truth or falsity of the statements was not an issue before the Commission, appellant could not have been prejudiced by the Chairman's participation in the proceedings.

Appellant's most serious allegation is that since the Civil Service Commission specifically found that "there was no evil or malice in a legal sense on the part" of appellant and since the Commission did not find that the statements of appellant were either known to be false or made with reckless disregard for their truth or falsity, as a matter of law, the Commission should have dismissed the charges against appellant. This brings us to the question that this case is really all about. Does a public employee have an absolute constitutional right to make public comment regarding matters of public interest where the statements are true and not made with a reckless disregard as to truth or falsity? If such speech is not constitutionally protected, then we reach the additional question of whether the statements and accusations made by appellant in this case could be sufficient as a matter of law to constitute misconduct and justify his dismissal.

The leading case in this area is *Pickering* v. *Board of Education,* 391 U.S. 563, 20 L.Ed. 2d 811, 88 S.Ct. 1731. In that case Pickering, a school teacher, wrote a letter to the editor of the local newspaper severely criticizing the school board and the district superintendent. Thereafter charges were brought and after a hearing the Board of Education dismissed Pickering upon the grounds that publication of the letter was "detrimental to the efficient operation and administration of the schools of the district", and hence, under the relevant statute the "interests of the school required his dismissal".

On certiorari the United States Supreme Court reversed the decision and stated as follows:

> "In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."

However, it is our opinion that the Supreme Court in that case by no means meant to say that a governmental employer could under no circumstances discharge an employee for his public statements.

The majority opinion in Pickering explains as follows:

"Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made 'with knowledge that they were false or not,' *New York Times Company* v. *Sullivan*, 376 U.S. 254, 280, 11 L.Ed. 2d 686, 706, 84 S.Ct. 710, 95 ALR 2d 1412 (1964), should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of first amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interest should run."

The Court in Pickering then went on to say:

"At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a

> citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

The Supreme Court in Pickering then went on to point out some of the circumstances in which the interests of the State might outweigh the interests of the teacher as a citizen. Although these circumstances were not found to exist in the Pickering case, we are led to believe that if they had existed the result in Pickering would have been different. Therefore, in order to decide the case before this Court we must look to the relationship between appellant and the persons accused by him and determine the effect such accusations reasonably could be calculated to have upon that relationship. In Pickering the statements were in no way directed towards any person with whom he would normally be in contact in the course of his daily work and there was no question of maintaining either discipline by immediate superiors or harmony among co-workers. In Pickering there was no close working relationships requiring personal loyality (sic) and confidence to insure their proper functioning. In the case before this court, however, quite the opposite is true. Appellant accused the Mayor of attempting to use the Personnel Office for "political appointment" by trying to bend the Civil Service Rules. He accused the Mayor of trying to "hamstring" the Personnel Department so that it could not function. In effect, he

accused the Acting Chief Administrative Officer of functioning in a "token" manner. He accused the Mayor's Administrative Assistant of acting de facto as Chief Administrative Officer. He charged that local government employees had been treated similar to "mushroom management" — "put them in a dark room, feed them crap and hope they grow". He accused the Fire Department of "favoritism" and accused other department heads of concealing information as to job openings.

Unquestionably, the making of such public statements by a person who occupied the position of Director of Personnel and who was by the Charter of the Urban County Government charged with responsibility for the administration of all ordinances and regulations pertaining to the classified civil service including all recruitment, examination, classification, probation, promotion and compensation programs affecting the classified civil service would have a disruptive effect upon the operation of the very department for which he was given responsibility. Although the appellant, like the teacher Pickering, as a citizen had the constitutionally protected right of free speech, unlike Pickering, appellant also had the lawfully imposed duty not to make inflammatory and disruptive statements, whether true or false, which by any reasonable standard would be calculated to prejudice the efficient operation of his department and to jeopardize his own ability to perform the functions of his office.

We think that the real distinction between the Pickering case and the case before this Court is that the circumstances of that case were such that the Supreme Court found it necessary to regard the teacher Pickering as a member of the general public because as noted by the Court in the case the fact of Pickering's employment was only tangentially and insubstantially involved in the subject matter of his public speech. In the case before this Court the statements and accusations made by appellant were directly and substantially concerning his employment.

The following findings of the Civil Service Commission are significant:

> "We believe that if the Director of Personnel of the Lexington Fayette Urban County Government believed that there existed improprieties and rule bending in the area of personnel, that it was incumbant upon him to take affirmative steps within the structure of government to correct these situations or bring them to the attention of his superiors, and if warranted, in his opinion, to the Civil Service Commission and the Urban County Council. He did not do so prior to or simultaneously with his announcement to the press nor had it been shown that he did so subsequently and prior to his suspension some thirty days later.
>
> "It is the opinion of this Commission that a reasonable man under the same and similar circumstances would not have so conducted himself and that the handling of the entire matter by Terrence K. Brady as shown by the evidence

herein is conduct that has unnecessarily and improperly undermined public faith in the personnel system of government, causing a breach or disruption of communications between the Director of Personnel and other persons in the Executive Branch of Government. We are further of the opinion that although without malice but with a reckless disregard for the consequences said conduct was calculated to disrupt the orderly and harmonious operation of the government and its personnel system. Such conduct constitutes misconduct within the meaning of KRS Chapter 90."[1]

It is the clear import of the law that the right of a public employee to make public statements must be qualified in light of the responsibilities imposed upon him by the position he holds. It is the opinion of this Court that the making of the statements and accusations in the news media rather than making appropriate charges and complaints before the Urban County Council or the Civil Service Commission was totally inconsistent with appellant's duties and responsibilities as Director of Personnel.

By his public speech, appellant prejudiced the efficient operation of his office and severely impeded his own ability to properly function as Director. Neither was the public interest promoted by appellant's choice of forum. Needless to say, the public does have a "right to know" and the First Amendment is designed to

1. The correct reference should have been to KRS 67A.280.

protect the interest of the public in "uninhibited and robust debate on matters of public concern". However, the problem in this case is that while the same charges might have been informative and constructive if made through proper channels, the accusations made by appellant in the press promoted only speculation and suspicion without providing an appropriate means of remedy or recourse.

Under the circumstances of this case we are forced to conclude that appellant's speech was not protected by the First Amendment to the United States Constitution.

We now reach the question of whether the public statements of the appellant could be held to constitute "misconduct" as provided in KRS 67A.280. Since, as previously indicated, we believe that this Court should be bound by the administrative determinations of the Civil Service Commission made in the course of a hearing pursuant to a statute affording procedural due process, our consideration of the matter is limited to the question of whether the statutory standard of "misconduct" is overbroad or legally not capable of being interpreted so as to include statements such as made by appellant in this case.

A closely related situation was considered by the Supreme Court of the United States in the case of *Arnett* v. *Kennedy,* 416 U.S. 134, 40 L.Ed. 2d 15, 94 S.Ct. 1633 (1974). In that case the standard authorizing

dismissal of a Civil Service employee set forth in the Lloyd-Lafollette Act, "such cause as will promote the efficiency of the service" was held constitutionally sufficient against charges both of overbreadth and vagueness. In that case the Court stated as follows:

> "Because of the infinite variety of factual situations in which public statements by government employees might reasonably justify dismissal for 'cause', we conclude that the act describes, as explicitly as is required, the employee conduct which is grounds for removal. The essential fairness of this broad and general removal standard, and the impracticability of greater specificity, were recognized by Judge Leventhal, writing for a panel of the United States Court of Appeals for the District of Columbia Circuit in *Meehan* v. *Macy,* 129 U.S. App. D.C. 217, 230, 392 Fed. 2d 822, 835 (1968), modified, 138 U.S. App. D.C. 38, 425 Fed. 2d 469, aff'd. en banc, 138 U.S. App. D.C. 41, 425. Fed. 2d 472 (1969):
>
> "It is not feasible or necessary for the government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees include 'catch all' clauses prohibiting employee 'misconduct', 'immorality,' or 'conduct unbecoming.' We think it is inherent in the employment relationship as a matter of common sense if not of common law that a government employee cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and

> defamatory lampoons . . . dismissal in such circumstances neither comes as an unfair surprise nor is so unexpected as to chill . . . freedom to engage in appropriate speech."
>
> "Since Congress when it enacted the Lloyd-Lafollette Act did so with the intention of conferring job protection rights on federal employees which they had not previously had, it obviously did not intend to authorize discharge under the Act's removal standard for speech which is constitutionally protected. The Act proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency and it thus imposes no greater controls on the behavior of federal employees than are necessary for the protection of the government as an employer. Indeed the act is not directed at speech as such but at employee behavior, including speech, which is detrimental to the efficiency of the employing agency."

It is our opinion that in this case the term "misconduct", being the standard for removal of a Civil Service Employee provided by statute is not constitutionally vague nor overbroad and that it would be within the discretion of the Civil Service Commission to find that the public statements and accusations made by the appellant in this case did constitute misconduct and were sufficient to justify his dismissal.

It is the opinion of this Court that the Appeal should be dismissed at appellant's costs.

The Clerk will make this opinion a part of the record and the attorney's will prepare an appropriate order in conformity herewith.

/s/ George E. Barker
JUDGE

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APPENDIX E

OPINION RENDERED: May 26, 1978
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. CA-1191-MR

TERRENCE K. BRADY — APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HON. GEORGE E. BARKER, JUDGE
ACTION NO. 75-32

H. FOSTER PETTIT, MAYOR, Lexington-Fayette Urban County Government; DEAN D. HUNTER, JR., Chief Administrative Officer of the Lexington Fayette Urban County Government; SIDNEY C. KINKEAD, JR., Chairman, JULIAN A. JACKSON, SR., WILFRED T. SEALS, WALTER LEET, JR., and WANDA V. CRANFILL, Members, Lexington-Fayette Urban County Government Civil Service Commission — APPELLEES

AFFIRMING

****

BEFORE: MARTIN, Chief Judge, COOPER and VANCE, Judges

MARTIN, Chief Judge. In 1974 appellant, Terrence K. Brady, was serving as Director of Personnel of the Lexington-Fayette Urban County Government. On

September 19, 20, and 24 the Lexington newspapers printed statements by the appellant which accused the Mayor, appellee herein, of attempting to bend civil service rules in order to place political allies in jobs for which they were not qualified. Appellant levelled numerous other charges against county officials to the effect that the merit system and civil service rules were being disregarded in the wake of political favoritism. Appellant further threatened to resign, stating that he no longer felt allegiance to his job.

On October 17 the Mayor filed charges in accordance with KRS 67A.280 against appellant. After holding a lengthy hearing, the Civil Service Commission concluded that appellant had a duty to discuss his accusations with his superiors in county government before airing them publicly. It was the opinion of the Commission that Brady's conduct had undermined public faith in the personnel system and had caused a disruption of communications between him and other persons in the executive branch of government. The Commission found Brady guilty of misconduct and discharged him from the position of Director of Personnel.

Brady appealed this decision to the Fayette Circuit Court. In two very detailed opinions dated September 3, 1975, and February 7, 1977, the circuit court ruled that a rehearing of the evidence, as requested by appellant, was not within the purview of the requirement of KRS 67A.290(2) that the case be tried

de novo. The circuit court further held that Brady's dismissal did not violate his constitutional rights of free speech. This appeal followed.

In support of his position that the terminology "trial *de novo*" means that the entire case against him be reheard in a separate proceeding before the circuit court, the appellant cites *Osborne* v. *Bullitt County Board of Education*, Ky., 415 S.W.2d 607 (1967). Appellant argues that the scope of judicial review of administrative decisions is more broad in cases involving individual rights than those involving property rights, such as, *American Beauty Homes Corp.* v. *Louisville and Jefferson County Planning and Zoning Commission*, Ky., 379 S.W.2d 450 (1964).

We disagree. The rationale of both cases is that the primary duty of the circuit court in reviewing administrative decisions is to insure that the agency's ruling was not arbitrary and that the defendant was afforded substantial due process at the administrative hearing. This was precisely the conclusion reached by the trial judge after his thorough analysis of the legislative intent in the establishment of administrative boards and the cases construing the scope of judicial review. Furthermore, appellant makes no allegation that he was denied a substantial right at the administrative hearing. Thus, the trial judge rules correctly in denying appellant a trial *de novo*.

Appellant primarily relies on *Pickering* v. *Board of Education*, 391 U.S. 564, 88 S.Ct. 1731, 20 L.Ed.2d

811 (1968), to support his argument that his discharge as a result of the interviews was a denial of his constitutional right of free speech. In *Pickering* the U.S. Supreme Court reversed a school board's dismissal of a teacher because of derogatory statements he had made in a letter to a newspaper. However, the court made a specific finding that Pickering's public statements did not impede the proper performance of his teaching duties nor did they interfere with the regular operation of the school system. The court further limited its opinion by finding that *Pickering* did not present a question of harmony among co-workers, nor were there involved close working relationships wherein personal loyalty and confidence are necessary to the proper functioning of the employment relationship.

It is apparent to us that appellant's situation is quite different from that of *Pickering* and more analogous to the exceptions stated therein. Both the Civil Service Commission and the trial court determined that Brady had jeopardized his ability to serve as Director of Personnel because of his statements. His conduct disrupted communications between his office and other executives of the county government, and the orderly operation of the personnel system had been endangered. The problem in any case is to arrive at a balance between the interests of the employee as a citizen, in commenting upon matters of public concern, and the interest of the state, as an

employer, in promoting the efficiency of the public services it performs through its employees. Here, we agree with the trial court that Brady had a duty to voice his criticisms internally, so as to avoid undermining public confidence in the government and to insure the government's orderly administration.

The judgment of the Fayette Circuit Court is affirmed.

COOPER, JUDGE, CONCURS.

VANCE, JUDGE, CONCURS IN THE RESULT ONLY.

* * * * * * *

APPENDIX F

[29]

BRADY v. PETTIT

Cite as, Ky., 586 S.W.2d 29

Terrence K. BRADY, Movant,

v.

H. Foster PETTIT, Mayor, Lexington-Fayette Urban County Government, Dean D. Hunter, Jr., Chief Administrative Officer of the Lexington-Fayette Urban County Government, Sidney C. Kinkead, Jr., Chairman, Julian A. Jackson, Sr., Wilfred T. Seals, Walter Leet, Jr. and Wanda V. Cranfill, Members Lexington-Fayette Urban County Government Civil Service Commission, Respondents.

Supreme Court of Kentucky.

July 3, 1979.

Former personnel director of Urban County government sought review of his discharge. The Fayette Circuit Court upheld the discharge and the Court of Appeals affirmed. The Supreme Court, Stephenson, J., held that discharged personnel director was entitled to trial de novo in the circuit court in which burden of proof would be on the discharged employee who would have the obligation of producing the transcript of the evidence of the proceeding before the administrative board and who would have the right to call additional witnesses.

Reversed.

Stephenson, J., filed an opinion concurring in part and dissenting in part in which Palmore, C. J., concurred.

1. Zoning and Planning — 642

Rule that statutes providing for trial de novo in the circuit court of administrative matters decided by appropriate bodies violates the constitutional doctrine of separation of powers and that trial de novo provisions cannot be foisted upon the judiciary by the legislature applies only to zoning matters and matters of like nature.

2. Officers and Public Employees — 72(2)

Public employees seeking review of their discharges are entitled to trial de novo in the circuit court; person who was removed by the civil service commission from position as personnel director of the urban county government was entitled to a trial de novo.

3. Officers and Public Employees — 72(2)

In public employee discharge cases where there is a trial de novo statute, discharged employee is entitled to something less than a classic trial de novo in circuit court; burden of proof shifts to the discharged employee and, after review of the transcript of evidence or hearing the witnesses, the trial court is limited in its decision and may not substitute its judgment for that of the administrative body and may not impose a substitute punishment; trial court may find that the

discharged employ[30]ee has failed to meet the burden of proof and affirm the action of the administrative board or, if it is found that the employee sustained the burden of proof, trial court may set aside the punishment.

4. Officers and Public Employees — 72(2)

Discharged public employee has the obligation of producing, at trial de novo in the circuit court, transcript of evidence in the proceeding before the administrative board; discharged employee also has the right to call additional witnesses if he so desires; trial court's review is limited to a determination of whether the administrative body acted arbitrarily.

Michael R. Moloney, Geralds, Cassidy & Moloney, Lexington, for movant.

R. Burl McCoy, Susan W. Wanat, Mary Ann DeLaney, C. Timothy Cone, Jane E. Graham, Lexington-Fayette Urban County Government, Lexington, for respondent.

STEPHENSON, Justice.

Following a hearing before the civil service commission of the Urban County Government, Terrence K. Brady was found guilty of misconduct and was discharged from his position as personnel director of the Urban County Government. The trial court held that Brady was not entitled to a trial de novo in circuit court and that the discharge was justified and entered

summary judgement approving the action of the civil service commission. The Court of Appeals affirmed the judgment of the trial court. We granted discretionary review and reverse.

The facts as detailed in the opinion of the Court of Appeals are as follows. In 1974 Terrence K. Brady was serving as director of personnel of the Lexington-Fayette Urban County Government. On September 19, 20 and 24 the Lexington newspaper printed statements by Brady which accused the mayor of attempting to bend civil service rules in order to place political allies in jobs for which they were not qualified. Brady leveled numerous other charges against county officials to the effect that the merit system and civil service rules were being disregarded in the wake of political favoritism. Brady further threatened to resign, stating that he no longer felt allegiance to his job. On October 17, the mayor filed charges in accordance with KRS 67A.280 against Brady. After holding a lengthy hearing, the civil service commission concluded that Brady had a duty to discuss his accusations with his superiors in county government before airing them publicly. It was the opinion of the commission that Brady's conduct had undermined public faith in the personnel system and had caused a disruption of communication between himself and other persons in the executive branch of government. The commission found Brady guilty of misconduct and discharged him from the position of director of personnel.

Brady appealed this action of the civil service commission to the Fayette Circuit Court and demanded a trial de novo in accordance with KRS 67A.290, which provides:

> (1) Any employe of the urban-county government found guilty by the civil service commission of any charge as provided by KRS 67A.280 or any action upheld under subsection (7) of the said section, or any amendment thereto, may appeal to the circuit court of the county in which the urban-county government is located within thirty (30) days after such action becomes final, but the enforcement of the judgment of the civil service commission shall not be suspended pending appeal.
>
> (2) Upon request in writing by the accused and the payment of costs therefor, the secretary of the civil service commission shall file a certified copy of the charges and the judgment of that body in the circuit court. Upon the transcript being filed the case shall be docketed in the circuit court and tried de novo.

The trial court declined to hear the case de novo on authority of *American Beauty Homes Corp.* v. *Louisville and Jefferson County Planning and Zoning Commission,* Ky., 379 S.W.2d 450 (1964), and decided the case on the record brought before the court, **[31]** granting respondents' motion for summary judgment. The record did not include the transcript of evidence heard before the civil service commission.

We do not consider the decision of the trial court on the merits of Brady's claim of violation of his first amendment rights. We consider the threshold question, one of procedure and reverse on this ground.

[1, 2] We are of the opinion the trial court erred in relying on *American Beauty Homes* without reference to the subsequent opinions by this court that have eroded the holding in *American Beauty Homes*. Standing alone, *American Beauty Homes* is authority that statutes providing for trial de novo in circuit court of administrative matters decided by appropriate bodies violates the constitutional doctrine of separation of powers and trial de novo provisions cannot be foisted upon the judiciary by the legislature. From the review of our opinions since, we conclude that *American Beauty Homes* now applies only to zoning matters and matters of like nature. A separate rule of law in de novo situations has developed in situations involving the discharge of teachers, policemen, firemen and the like. We conclude that the movant here falls within this category.

American Beauty Homes was decided in 1964 and overruled *Louisville and Jefferson County Planning and Zoning Commission* v. *Grady*, Ky., 273 S.W.2d 563 (1954). As stated *American Beauty Homes* rejected the de novo statute on the ground that the statute undertakes to impose on the court a nonjudicial function. *Grady* in considering a de novo statute in a zoning case held that "A hearing de novo means 'trying

the dispute anew as if no decision had been previously rendered' " and recognized the authority of the legislature to determine by statute whether or not there should be a classic de novo hearing.

Harrell v. *City of Middlesboro,* Ky., 287 S.W.2d 614, 615 (1956), without referring to *Grady,* eroded the classic de novo stance of *Grady* in the discharge of a police officer saying:

> In order that the terms might be interpreted in the light of the customs of the community, their application and definition were left to the legislative body of that particular political entity instead of to the courts, except upon appeal. So, under this statute, the legislative body is charged with the duty to performing the judicial act of trying the accused officer and we believe we must accord to the judgment of that body the weight and sufficiency attributed to the legislative branch of the government in matters requiring definition of public policy.
>
> It is true KRS 95.460 requires that upon appeal to the circuit court the case should be tried de novo by the judge of that court. We do not believe this to mean that the finding of the common council should not be assigned some weight, and interpret it to mean that the common council's finding as to the mores of the community should be given consideration.

It is not clear from the opinion what type proceeding was held in the circuit court, only that a trial was held.

Harrell foreshadowed *American Beauty Homes* and *Board of Education of Ashland School District* v. *Chattin*, Ky., 376 S.W.2d 693 (1964). *Chattin* involved the discharge of a school teacher and cited *American Beauty Homes*. *Chattin* held that a de novo trial could not constitutionally be thrust upon the courts, and on the factual issues the circuit court is confined to the record of proceedings had before the administrative body and is bound by the administrative decision if it is supported by substantial evidence.

The first indication that this court was not wholly committed to *American Beauty Homes* and *Chattin* came in *Kilburn* v. *Colwell*, Ky., 396 S.W.2d 803 (1965), there a police officer had been discharged and on appeal to the circuit court the case was tried de novo and the dismissal affirmed. Without reference to *American Beauty Homes* or *Chattin*, the opinion narrowed the holding in those cases relying on *Harrell* and citing a case relied upon in *Harrell:*

> *In City of Owensboro* v. *Noffsinger*, Ky., 280 S.W.2d 517, 519 (1955), it was **[32]** held that in a de novo hearing under KRS 95.640 the question to be determined by the circuit court is not whether there is substantial evidence to support the action of the city legislative body, but whether the evidence preponderates against it. The practical effect of that test is to shift the burden of proof to the appealing party, which means that the review is something less than purely de novo.

Here the significant holding of a shift in the burden of proof is expressed for the first time. *City of Owensboro* was relied upon in *Harrell*, being cited with approval for the denial of trial by jury, but evidently relied upon at least to some extent in the holding. Thus a different rule in a de novo had developed in cases involving the dismissal of public employees. This rule is further amplified in *Osborne* v. *Bullitt County Board of Education*, Ky., 415 S.W.2d 607 (1967). There *American Beauty Homes* is limited to zoning and other administrative acts and held not to be applicable to school teachers in particular and, although not stated, the implication is that other public employees are included. Also *Chattin* was overruled to the extent that it held that the trial court was limited to a review of the proceeding before the board and not a trial de novo. *Osborne* holds that the legislature may properly require a trial de novo upon *certain actions* of administrative bodies without doing violence to the constitutional requirement of separation of powers. While the statute under consideration was not a true de novo statute as here, *Osborne* made no distinction, implying the right to a de novo trial from the language of the statute. *Osborne* did not refer to *Kilburn* or mention the proposition of a shift in the burden of proof in circuit court. At this point it appears that the proposition of de novo is proceeding down several roads converging here so that we may attempt to unravel what are seeming inconsistencies.

In *Story* v. *Simpson County Board of Education,* Ky., 420 S.W.2d 578 (1967), we pointed out that *Chattin* had been overruled to the extent it denied the right to trial de novo in the circuit court and reversed for a trial de novo for the principal who had been discharged. No reference is made to *Kilburn* or *Harrell.*

City of Glasgow v. *Duncan,* Ky., 437 S.W.2d 199 (1969), involved the dismissal of a police officer. The opinion observed that the city council occupies the same role as the school board in *Osborne* and that a trial de novo was properly conducted. The circuit court heard the witness and set aside the order of the council dismissing Duncan. *Kilburn* and *City of Owensboro* are not referred to in the opinion, although there was argument cited in the opinion that the evidence produced before the trial court did not preponderate against findings and action of the city. This would lead us to believe that implicit in *City of Glasgow* was the recognition by the parties of the shifting of burden of proof inferred in *City of Owensboro* and articulated in *Kilburn.*

Finally in *City of Richmond* v. *Howell,* Ky., 448 S.W.2d 662 (1969), a policeman appealed his dismissal to the circuit court and received a de novo hearing. The circuit court, after the de novo hearing, reduced the penalty to a limited suspension. In reversing the trial court, the opinion goes on to say that the circuit court did not have authority to change the punishment fixed by the city legislative body. There is a statement that

sound public policy requires that the matter of punishment and discipline of a police officer be left to his employer, the city legislative body. Here *Kilburn* is cited and relied upon, as was *Harrell*, reaffirming the proposition that the burden of proof is shifted to the appealing party; this together with the statement that the review provided by the statute is something less than purely de novo. The opinion points out dictum in *City of Glasgow* that would appear to shift the burden of proof to the public authority, which is inconsistent with *Harrell* and *Kilburn*, observing, however, that *City of Glasgow* reaches the correct result for the reason that the evidence was overwhelmingly in favor of the dismissed officer.

[3] In summary, it appears that in public employee discharge cases where there is **[33]** a trial de novo statute, the discharged employee is entitled to something less than a classic trial de novo in circuit court. In this proceeding in circuit court the burden of proof shifts to the discharged employee. After review of the transcript of evidence or hearing the witnesses, the trial court is limited in its decision. The trial court may not substitute its judgment for that of the administrative body, that is, there may not be a substitute punishment. The trial court may find the discharged employee has failed to meet the burden of proof and affirm the action of the administrative board; or if it is found that the employee has sustained the burden of proof, the trial court may set aside the punishment.

With the exception of *Harrell* and *Osborne*, where the opinions do not reveal the type proceeding in circuit court, all the opinions subsequent to *American Beauty Homes* have revealed that the trial ccourt has heard the witnesses. This procedure has not been a subject of controversy, and in addressing the principles of de novo this court has not mentioned the procedure other than a recitation of what transpired in the circuit court.

[4] We are of the opinion that trial de novo be further refined to the extent that the discharged employee has the obligation of producing the transcript of evidence of the proceeding before the administrative board. We are of the further opinion that review of the transcript of evidence in circuit court is a corollary to the burden of proof which has shifted to the discharged employee. In circuit court the transcript of evidence is reviewed but the proceeding is not limited to this review; the discharged employee is accorded the right to call such additional witnesses as he may desire. The trial court's review is limited to a determination of whether the administrative body acted *arbitrarily*.

The opinion of the Court of Appeals and the judgment of the trial court are reversed with directions that Brady be granted a reasonable time to file the transcript of evidence and thereafter be granted a trial de novo consistent with this opinion.

AKER, CLAYTON, LUKOWSKY, REED and STERNBERG, JJ., concur.

STEPHENSON, J., and PALMORE, C. J., concur in part and dissent in part.

STEPHENSON, Justice, concurring in part; dissenting in part.

I agree this case should be reversed; however, I am unwilling to agree to any further refinements on the subject of de novo. The majority opinion has, by the changes in the present state of case law, turned around and started again down the road toward *American Beauty Homes*. My opinion is that there are practical considerations that militate against a requirement that the employee furnish the transcript of evidence. In many instances this may involve more expense than the employee is willing to risk.

I would construe de novo as giving the employee the option of furnishing the transcript of evidence or producing witnesses. Further, if the transcript of evidence is produced, the employee should have the right to produce additional witnesses as desired.

The decision of the trial court would then evolve on whether the discharged employee sustained the burden of proof.

PALMORE, C. J., joins in this separate opinion.

* * * * * * *

APPENDIX G

SUPREME COURT OF KENTUCKY

87-SC-437-D

(86-CA-1288-MR)

TERRENCE K. BRADY MOVANT

V. FAYETTE CIRCUIT COURT

NO. 75-CI-32

H. FOSTER PETTIT, ETC., ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion of the movant for a review of the decision of the Court of Appeals is denied.

ENTERED July 30, 1987.

/s/ Robert F. Stephens
Chief Justice

* * * * * * *

APPENDIX H

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT CIVIL SERVICE COMMISSION

IN RE:

TERRENCE K. BRADY
DIRECTOR OF PERSONNEL

STATEMENT OF CHARGES

Pursuant to KRS Chapter 90, (Section 8 of Chapter 246 of 1974 Acts of Kentucky Legislature) the following charges are preferred against Terrence K. Brady, Director of Personnel:

CHARGE I

Said Terrence K. Brady engaged in misconduct on September 19, 1974, in that, while holding the responsible position of Director of Personnel of the Government, he arrranged and gave a press interview with Darlene Bowden, a reporter with the Lexington Leader, a newspaper of general circulation in the Urban County, in which he made serious charges concerning H. Foster Pettit, Mayor, Urban County Government supervisors, and the Urban County Council as follows:

1. Accused H. Foster Pettit, Mayor, of "attempting to use the Personnel office for 'political appointments' by attempting to bend the civil service rules."

2. Accused H. Foster Pettit, Mayor, of attempting to "bend certain civil service procedures for the appointment of a Director of Planning," and further charged "it is possible the Mayor is trying to get a particular person for this job."

3. Alleged that Acting Chief Administrative Officer Harry Sykes had been "used" by the Mayor and that Sykes' position in the Government had been one of "tokenism."

4. Charged that fellow supervisors throughout the Government were failing to post on the bulletin board notices stating which jobs are coming open and that some supervisors are deliberately "holding back" this information.

5. Accused H. Foster Pettit, Mayor, and the Urban County Council of Attempting to "hamstring" the Personnel office by not providing the Personnel Department with sufficient help.

6. Charged that promotions in both the Police and Fire Department were handled internally and that in the Fire Department there are "accusations of favoritism".

7. Stated that he no longer owes allegiance to his employer by stating in the attached Exhibit A as follows:

> ". . . always considered I owed my allegiance to my employer. I wouldn't talk against him. I would just leave."

"Now my allegiance is someplace else."

He explained this by saying he meant the Urban County Council and the people they represent.

All of said charges are without merit, but irrespective of their merit or lack thereof, the making of them in the public and unilateral channel of the news media rather than through proper available channels with the persons involved or appropriate bodies of the Government having jurisdiction resulted in the newspaper article attached hereto and incorporated herein by reference as Exhibit A. This conduct has unnecessarily and improperly undermined public faith in the personnel system of the Government and has caused a breach or disruption of communications between the Director of Personnel and other persons in the executive branch of the Government, and constituted misconduct calculated to disrupt the orderly and harmonious operation of the Government, and its personnel system.

The above said activity by Terrence K. Brady constitutes misconduct within the meaning of KRS Chapter 90, and did, and continues to, impair the administration of the service in which he is engaged.

CHARGE II

After the foregoing misconduct resulted in the attached article improperly reflecting on the personnel system and officers of the Government, said Terrence K. Brady engaged in further such misconduct in that he engaged in the following news media activities without attempting to communicate any complaint through proper governmental channels with persons or bodies having jurisdiction:

1. On September 20, 1974, said Terrence K. Brady did, in an interview with Darlene Bowden, a reporter with the Lexington Leader, a newspaper of general circulation in the Urban County make additional charges concerning H. Foster Pettit, Mayor, Dianne Schorr, the Mayor's Administrative Assistant, and fellow department heads, resulting in newspaper articles attached hereto and incorporated herein by reference as Exhibit B.

2. On September 24, 1974, at approximately 11:30 a.m. said Terrence K. Brady conferred in the Urban County Council Chambers with various representatives of the Fayette County news media and did reaffirm his previous allegations, charges and statements to the news media against the aforesaid Mayor Pettit and others as set out above by stating, among other things, that "I stand behind my statements."

All of the aforesaid activity as set out in Charge II was again designed to voice publicly said

Terrence K. Brady's allegations and complaints against Mayor Pettit and other members and officials of the Urban County Government without first proceeding through the proper Governmental channels with persons or bodies having jurisdiction.

The above said activity by Terrence K. Brady constitutes misconduct within the meaning of KRS Chapter 90, and did, and continues to, impair the administration of the service in which he is engaged.

A copy of the foregoing is being filed this 17th day of October, 1974, with Dean D. Hunter, Jr., Chief Administrative Officer of the Lexington-Fayette Urban County Government.

/s/ H. Foster Pettit
H. Foster Pettit,
Mayor

* * * * * * *

EXHIBIT A TO APPENDIX H

[Page 1]

Lexington Leader

Lexington, Kentucky,
Thursday, September 19, 1974

Personnel Chief Levels Charges At Pettit

By DARLENE BOWDEN
Leader Staff Writer

Terrence Brady, personnel director for the Urban County Government, said today he is considering resigning because, he charged, Mayor Foster Pettit has attempted to use the Personnel Office for "political appointment" by trying to bend the Civil Service rules. He also said the mayor is trying to "hamstring" the Personnel Department so that it cannot function.

In an exclusive interview with *The Leader*, Brady said the mayor's appointment of Stephen Driesler as alcoholic beverage control administrator is a "political appointment." He said the mayor had tried to get Driesler appointed to other Civil Service positions.

He also charged that the mayor has "used" Harry Sykes, the acting chief administrative officer, and that Sykes position in the government has been one of "tokenism."

"I am completely disenchanted and am considering resigning, but I don't know if I should or not," he said.

He said the mayor had asked about "bending certain Civil Service procedures" for the appointment of a director of planning.

Brady said that the choice of a director had been narrowed to three persons and that by Civil Service procedures, one of these candidates should be appointed. He said that the mayor now wants to reopen the search for someone to fill the position.

Brady charged it is "possible" the mayor is trying to get a particular person for this job.

"For some time I have been trying to get extra help in this office," Brady said. "I have gone to the mayor, the administration and the council and they have acknowledged my need but I've gotten no support."

Brady said he is working a minimum of 80 hours a week trying to handle the

(Photo of Terrence Brady)

TERRENCE BRADY
Says He May Resign

workload of the personnel office.

"I think in essence this is being done purposely as a

Mayor Foster Pettit could not be reached today for comment on these charges by Personnel Director Terrence Brady. His office said he was making a speech out of state and they did not know how to reach him.

---

way to hamstring this office." he charged.

'Honeymoon Over'

"When I was hired here a year ago, I was hired through Civil Service rules. I hardly knew who the mayor was. When I was interviewed I had the understanding that politics, would not be involved in appointment. But I have been urged to see what I could do about certain appointments. Each time, I resisted.

"After several months I realized the honeymoon was over."

One or two councilmen have also asked about "placing people" but these requests were not "in the same vein" as the mayor's, he claimed. "They did not know the Civil Service rules but the mayor does."

"One of the reasons that we have the discontent among the government employes is there has not been a concern with the employes and their problems," Brady said. "Things that are wrong have been brought to mayor's attention and in most cases nothing was done."

'Very Real Gripes'

Brady declared that the firefighters had "very real gripes" and that the department had been "run with an iron hand."

He charged that promotions in both the police and fire departments were handled internally and that in

the fire department there are "accusations of favoritism."

Brady also charged that supervisors throughout the government are failing to post on the bulletin board notices stating which jobs are coming open and that some supervisors are "deliberately holding back" this information.

"This has been one of the complaints of the employes but no command has come down from the administration about this situation," Brady said.

Brady said that "many things have gone on that completely short-circuited" the personnel department and the office of the acting CAO. He said the acting CAO was "not given enough responsibilities."

Prior to being hired as the personnel director for the city Brady worked for four years in the area of personnel for private companies.

At present the personnel office is responsible for handling all hiring, payroll, other employe-related matters.

There are four clerks, two of whom were recently appointed. He said there was a considerable delay in getting these clerks and "I had to fight for them."

"One way to stop an office from functioning is load them down with too much work. That is what has happened. We can't handle complaints, or attempt to correct inequities. We need labor relations in the worst way," he said.

Brady said he is willing to come before the Urban County Council at tonight's official meeting if the councilmen wish him to.

Concerning this possible resignation, Brady said that previously he had "always considered I owed my allegiance to my employer. I wouldn't talk against him. I would just leave."

"Now my allegiance is someplace else."

He explained this by saying he meant the Urban County Council and the people they represent.

"I just haven't made up my mind," he said.

* * * * * * *

EXHIBIT B TO APPENDIX H

[Page 1]

Lexington Leader

Lexington, Kentucky,
Friday, September 20, 1974

New Charges Leveled At Pettit By Brady

By DARLENE BOWDEN
Leader Staff Writer

Terrence Brady, personnel director for the Urban County Government, said today that Mayor Foster Pettit tried to get Stephen Driesler, his former campaign aide and administrative assistant, appointed to a position of assistant corporate counsel.

Pettit recently appointed Driesler alcoholic beverage control administrator. The part-time, non-Civil Service job pays $7,500 annually.

Approval of the appointment was not brought before the Urban County Council, although Pettit said he had notified the councilmen of his intention to appoint Driesler.

At the mayor's request, the legal department issued an opinion on whether the mayor had the authority to make such an appointment. The legal department concluded he had the authority.

Driesler, 26, is a practicing attorney.

Pettit To Respond

Mayor Pettit said this morning he was preparing a statement in response to several charges Brady made Thursday.

Brady accused Pettit of using the personnel office for political appointments, attempting to bend Civil Service rules and "hamstring" the personnel department, so that it could not function, by not providing enough staff to handle the workload.

Brady also charged that the mayor had short-circuited the personnel office and the office of the chief administrative officer (CAO).

Brady today told *The Leader* that the mayor's administrative assistant, Ms. Dianne Scorr "has been acting defacto as CAO."

Brady said he hopes this will not continue after Dean Hunter officially takes over the position.

He said that the mayor had not contacted him this morning and that if he doesn't he will attempt to contact Pettit.

"It has been getting harder and harder to see the mayor," Brady said.

Brady said that since he made his statements Thursday to the *Leader* and to the Urban County council Thursday night, several councilmen had given him "encouragement" and the "supportive response from the employes has been surprising."

"I have gotten a feeling from the employes that they feel they have a spokesman and that I expressed something that needed to be said." Brady said.

"We've had a lot thrown at us in this department with the intention of bending us or breaking us. I decided I had to be my ownself and stand up for what I believe in or else be what someone else wanted me to be," he said.

If Pettit claims that Brady never brought his grievances to him, this would be "very untrue," Brady said.

[Page 1]

Lexington Leader

Lexington, Kentucky, Friday, September 20, 1974

Workers Applaud Brady In Dispute With Mayor

By DARLENE BOWDEN
Leader Staff Writer

The Urban County government's Personnel Director Terrence Brady has told the Urban County Council that the local government employes have been treated similar to "mushroom management."

"Put them in a dark room, feed them crap and hope they grow."

Brady drew a standing ovation from a room full of government employes when he entered the council chambers Thursday night.

During the public comment part of the meeting, Brady came before the council to explain actions he took Thursday morning.

In a story which ran in *The Leader*, Brady said he was considering resigning because Mayor Foster Pettit has attempted to use the personnel department for "political appointments" and that he has attempted to bend civil service rules.

The Mayor's recent appointment of Stephen Driesler, his former campaign aide and administrative assistant, to the Alcoholic Beverage Control Administrator post was political, Brady said. The mayor had tried to get Driesler appointed to other government posts but Driesler would have had to compete through civil service Brady said The ABC post is non-civil service.

Brady also charged that the mayor had "short circuited" the personnel department and the acting chief administrative officer; that he had used the acting CAO, Harry Sykes; and that the mayor had "hamstrung" the personnel department by keeping it understaffed to the point it could not function.

Thursday night, Brady told the council he would not resign unless the council wished him to.

"It was a hard decision to

(Continued on Page 26)

• Workers

(Continued From Page One)

make," Brady said. "I stayed up most of the night. I had three choices: to go on and not say anything; to resign quietly, or make the decision I did."

At a staff meeting held a week ago, he said he had brought up the fact that information about job openings was not filtering down to the employes.

Publication of the information was suggested by Brady.

One department head said, "These employes don't need to know anything," Brady said.

After the meeting, Brady was thronged with Urban County government employes, many of them firefighters, who wished to congratulate him on his stand.

Several councilmen shook his hand.

In Brady's statements to *The Leader,* he had noted that the firefighters had "real gripes" and the department had been "ruled with an ironhand."

Some of the firefighters gathered outside the Municipal building carrying a sign which read "Brady for Mayor."

Pettit was out of town Thursday and could not be reached for comment on the charges.

Reactions to Brady's statements from councilmen were mixed.

"I have knowledge to lead me to believe some of the things he said are true," Councilman Tony Curtsinger commented. "It is the council's duty to address this matter."

Councilman Jack Hall advocated that the matter be brought before the recently formed grievance com-

mittee. I hope he (Brady) will file a grievance if he thinks it should be done." Hall said.

Hall also said he was "happy" Brady had chosen not to resign and that he was "going to stick it out." Making his feelings known publicly was an "extremely tough decision."

Councilman Don Blevins agreed that the committee was a good vehicle for examining the charges but that he wanted to wait and see what Pettit has to say.

Councilman O. M. Travis Jr. said he didn't know if the charges were true or false but felt Brady should have said them to the Mayor's face and not while he was out of town.

"If he thought what he did was the right thing, it was proper," Councilman Bill Ward said.

Randy Myers, public Information officer for the local government, said he attended the meeting when the comment from the department head was made.

He also said that the charges in Brady's statements have been "rumored around City Hall" and that lately the rumors "have been about 85 per cent accurate."

Concerning Brady's statements that Sykes had been used and the office short circuited, Myers said it was his personal opinion that "Sykes has not been functional as a CAO" but that he didn't know why.

"Decisions were made at a higher level," Myers noted.

"But the mayor deserves the right to defend himself," Myers added.

Vice mayor Scotty Baesler said he would like to hear what the mayor has to say and that it was "incumbent" on the council to look into the matter "and take what action it deems appropriate."

"This is serious in nature, less for the content of the charges than the fact that it has occurred," Baesler said.

* * * * * * *

APPENDIX J

FAYETTE CIRCUIT COURT
CIVIL BRANCH
SIXTH DIVISION

TERRENCE K. BRADY — PLAINTIFF

V. — AMENDED COMPLAINT — NO. 75-32

H. FOSTER PETTIT, et al — DEFENDANTS

* * * * * * * * * * * *

Comes the Plaintiff for his amended complaint herein and states:

1. That he reiterates and reaffirms each and every allegation of his complaint; that the claims asserted herein arose out of the conduct, transaction, or occurrence set forth in the original complaint;

2. That the discharge of Plaintiff from his employment by the acts and conduct of Defendants complained of, subjected Plaintiff, or caused Plaintiff to be subjected to, the deprivation of Plaintiff's rights, privileges, or immunities secured to Plaintiff by the U. S. Constitution, under color of statute, ordinance, regulation, custom or usage of the Commonwealth of Kentucky and the Defendant Government;

3. That Plaintiff is a citizen of the United States;

4. That Defendants are persons within the meaning of 42 U.S.C. §1983;

5. That the matters about which Plaintiff spoke which were the basis of his discharge from his employment with the Defendant Government were matters of public concern, constituted protected speech within the meaning of the First Amendment to the U. S. Constitution;

6. That the discharge of Plaintiff by Defendants from Plaintiff's employment with the defendant government by reason of Plaintiff having exercised the right and privilege secured to Plaintiff under the First Amendment to the U. S. Constitution securing to Plaintiff the freedom of speech was constitutionally impermissible;

7. That Plaintiff, by reason of being a civil service employee of the Defendant Government, had a property right in and to his employment with the Defendant Government, protected by the Fourteenth Amendment to the U. S. Constitution against deprivation thereof, without due process of law;

8. That the discharge of Plaintiff from his employment with the Defendant Government, as complained of herein, deprived Plaintiff of liberty and property, without due process of law;

9. That Plaintiff's claims herein against the Defendants are brought under 42 U.S.C. §1983;

10. That by reason of the constitutionally impermissible conduct of the Defendants complained of, Plaintiff has been damaged by reason of having lost

earnings, suffered embarrassment, humiliation and extreme mental and emotional distress, as well as damage to his employment reputation in such amounts as the trier of fact determines are fair and reasonable as shown by the evidence; that the damages sought herein are in excess of the minimum dollar amount necessary to establish the jurisdiction of this court;

11. That Plaintiff incurred attorney's fees in connection with the defense of the charges which led to the Plaintiff's discharge from his employment with the defendant government, which amount Plaintiff ought to recover of Defendants, and each of them, as the trier of fact may determine is fair and reasonable under the evidence;

12. That the conduct of Defendants complained of herein was the result of the Defendants' reckless and callous indifference to Plaintiff's federally protected rights under the First and Fourteenth Amendments to the U. S. Constitution, as well as motivated by evil motive and intent; that by reason thereof Plaintiff ought to recover of the Defendants, and each of them, exemplary or punitive damages in such amount as the trier of fact may determine is fair and reasonable as shown by the evidence;

13. That Plaintiff ought to be re-instated to his former employment with the Defendant Government

or in the alternative, awarded front-pay in such amount as the trier of fact may determine is fair and reasonable under the evidence;

14. That Plaintiff ought to be awarded, as a part of his costs herein, a reasonable fee for his attorney under 42 U.S.C. §1988;

15. That he demands TRIAL BY JURY.

WHEREFORE, Plaintiff demands:

1. As in his original complaint;

2. Judgment against the Defendants, and each of them, as damages for lost earnings, embarrassment, humiliation and extreme mental and emotional distress, as well as damage to his employment reputation;

3. Judgment against the Defendants, and each of them, for the reasonable attorney's fees incurred by Plaintiff in defending the charges which led to his discharge from his employment with the Defendant Government;

4. Judgment against the Defendants, and each of them, for punitive or exemplary damages;

5. Re-instatement to his former employment with the Defendant Government or in the alternative, front-pay;

6. TRIAL BY JURY;

7. For his costs herein, including a reasonable fee for his attorney under 42 U.S.C. §1988;

8. Any and all other relief to which he may appear entitled.

/s/ William C. Jacobs
WILLIAM C. JACOBS
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2464

ATTORNEY FOR PLAINTIFF

* * * * * * *

APPENDIX K

FEB 24 1986

FAYETTE CIRCUIT COURT
CIVIL BRANCH
SIXTH DIVISION

TERRENCE K. BRADY — PLAINTIFF

V. — ORDER — NO. 75-32

H. FOSTER PETTIT, et al — DEFENDANTS

* * * * *

Comes the Plaintiff upon his motion under CR 15.01 for leave to file his Amended Complaint herein and the parties having been heard by counsel and the Court being advised,

IT IS HEREBY ORDERED:

1. That leave be, and it hereby is, GRANTED Plaintiff to file his Amended Complaint herein;

2. That the clerk be, and he hereby is, directed to file Plaintiff's Amended Complaint as a part of the record herein.

/s/ George E. Barker
JUDGE, FAYETTE CIRCUIT COURT

TO BE ENTERED:
NOTICE OF ENTRY WAIVED:

/s/ William C. Jacobs
ATTORNEY FOR PLAINTIFF

/s/ T. L. Holmes
ATTORNEY FOR DEFENDANTS

* * * * * * *

APPENDIX L

QUESTIONS OF LAW PRESENTED TO THE KENTUCKY SUPREME COURT ON PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

1. WHERE THE COMMISSION FOUND NONE OF BRADY'S STATEMENTS ON MATTERS OF PUBLIC CONCERN TO BE FALSE, NOR MADE WITH MALICE OR EVIL INTENT, DISCHARGING BRADY FOR SUCH CONDUCT VIOLATED HIS FIRST AND FOURTEENTH AMENDMENT RIGHTS OF FREE SPEECH, WARRANTING REVERSAL.

2. WHERE BRADY WAS CHARGED ONLY WITH SPEAKING PUBLICLY BEFORE GOING THROUGH GOVERNMENT CHANNELS, AND THE TRIAL COURT CONCLUDED THAT BRADY WAS NOT REQUIRED TO GO THROUGH CHANNELS BEFORE SPEAKING PUBLICLY, IT WAS ERROR TO UPHOLD HIS DISCHARGE.

3. WHERE BRADY WAS NOT CHARGED WITH FAILURE TO INVESTIGATE OR FAILURE TO CONSIDER THE CONSEQUENCES OF HIS PUBLIC SPEECH BEFORE EXERCISING THE RIGHT, IT WAS ERROR TO UPHOLD BRADY'S DISCHARGE BASED UPON THE TRIAL COURT'S CONCLUSION THAT BRADY WAS GUILTY OF SUCH CONDUCT.

4. WHERE THE TRIAL COURT UPHELD THE COMMISSION BY FINDING BRADY GUILTY OF CONDUCT OTHER THAN THAT WITH WHICH HE WAS CHARGED, AND BY FINDING BRADY'S STATEMENTS TO BE FALSE, ALTHOUGH THE COMMISSION FOUND NONE OF THEM TO BE SO, THE TRIAL COURT EXCEEDED THE LIMITATIONS ON ITS REVIEW, WARRANTING REVERSAL.

5. **WHERE THE CAUSE OF ACTION STATED IN THE AMENDED COMPLAINT WAS GROUNDED ON THE SAME EVENTS WHICH PRECIPITATED THE ORIGINAL COMPLAINT, IT WAS ERROR, IN LIGHT OF CR 15.03, FOR THE TRIAL COURT TO DISMISS THE AMENDED COMPLAINT AS TIME BARRED.**

6. **IT WAS ERROR FOR THE TRIAL COURT TO HOLD THAT BRADY HAD WAIVED HIS RIGHT TO TRIAL *DE NOVO,* WHEN DECIDING BRADY'S SUMMARY JUDGMENT MOTION WHICH HAD PENDED FOR NEARLY TWO YEARS BEFORE BEING RESOLVED BY THE FINAL JUDGMENT.**